93-589

Supreme Court, U.S.
FILED
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Case No. _____

SUPREME COURT OF THE UNITED STATES

October 1993 Term

PRO-TECH SECURITY,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT L. BARR, JR.
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(404) 951-1776

QUESTIONS PRESENTED

I. The first question presented is whether a United States Government contract, which has a substantial impact on National Defense, and which contains clauses included by operation of statute, controls the designation of status as supervisory personnel of the contractor under the National Labor Relations Act.

II. The second question presented is whether the National Labor Relations Board and the Court of Appeal have a duty to specially scrutinize the findings of the Administrative Law Judge

to find substantial evidence of status as a supervisor in a Federal Government contracts case.

III. The third question presented is whether the Adminsitrative Law Judge and the National Labor Relations Roard erred in making factual conclusions as to the motivations of Petitioner in issuing interrogatories to employees, in the face of the uncontradicted evidence of Petitioner.

PARTIES TO THE PROCEEDING

All parties in the Court of Appeals for the Fourth Circuit appear in the caption of this petition. Corespondent in the proceedings of the National Labor Relations Road and the National Labor Relations Board Administrative Law Judge was the International Union, United Plant Guard Workers of America (UPGWA).

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29 U.S.C. Section 151

29 U.S.C. Section 152

41 U.S.C. Section 405a

UNITED STATES CODE OF FEDERAL REGULATIONS

48 CFR 1.000

48 CFR 49.402.7

48 CFR Part 49.402

48 CFR Part 52.249-8

Pertinent parts of the statutes and regulations are contained in Appendix E.

OPINIONS BELOW

The United States Court of Appeals for the 4th Circuit entered an Order and opinion in this proceeding on June 8th, 1993, and denied reconsideration per curiam and without opinion on July 7, 1993.

The ruling of the United States Court of Appeals for the 4th Circuit was not reported and a copy of that Opinion is appended hereto as Appendix A. The Reconsideration was not reported and a copy of that Order is appended hereto as Appendix B. The Opinion of the National Labor Relations Board, Respondent herein, was not reported; a copy of that decision is appended hereto as Appendix C. The Opinion of the Administrative Law Judge which the National Labor Relations Board adopted was not reported; a copy of that Order is appended hereto as Appendix D.

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the 4th Circuit was entered on June 8th, 1993; and the Petitioner's Petition for Rehearing was denied per curiam without opinion on July 7, 1993. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. U 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue in this proceeding are the following provisions:

Amendment V of the Constitution of the United States of America, which states in pertinent part as follows:

* * *

No persons shall be deprived of life, liberty or property , without due process of law;...

The following are United States statutes and regulations at issue in this proceeding:

UNITED STATES STATUTES

29 U.S.C. Section 151

29 U.S.C. Section 152

41 U.S.C. Section 405a

UNITED STATES CODE OF FEDERAL REGULATIONS

48 CFR 1.000

48 CFR 49.402.7

48 CFR Part 49.402

48 CFR Part 52.249-8

Pertinent parts of the statutes and regulations are contained in Appendix E.

STATEMENT OF THE CASE

FACTS

This Petition for a Writ of Certiorari arises from the Circuit Court's affirmance of an Order by the National Labor Relations Board, and denial of rehearing, granting Respondent's request for an Order enforcing the provisions of the National Labor Relations Act against Petitioner. The Opinions of both the National Labor Relations Board and the Circuit Court affirm a finding by the Administrative Law Judge of the National Labor Relations Board that Petitioner had committed an unfair labor practice, and ordering rehiring of a terminated employee. Petitioner is a Sole Proprietorship, operated by Mr. Isaiah Rhodes, which performs guard services by contract to various United States government facilities. Petitioner entered into a contract in August, 1990 with the United States Coast Guard Base Support

Center in Elizabeth City, North Carolina. The Administrative Law Judge found that the contract has a substantial impact on National Defense. The Contract between Pro-Tech and the Coast Guard outlined the duties and responsibilities required of the contractor. This included personnel required to maintain security expected by the Coast Guard. According to the contract, the contract set forth specific duties for each employee, including designation of certain employees as Watch Commander and Site Supervisor. In addition to designation by the Coast Guard contract, the Watch Commander was given the power to discipline employees, and to oversee employees' work; and was given a distinguishing uniform and insignia, as well as higher pay and higher qualification requirements.

On November 24, 1990 the Watch Commander, Mr. Hassie Reynolds, organized a meeting with Union representatives which

was held at the Coast Guard Station during on duty hours. Mr. Reynolds' own testimony stated he did not follow proper procedures to hold a meeting on the Base, compliant with Coast Guard regulations, nor did he receive permission from the employer to hold a meeting on Base during duty hours. In fact, Mr. Reynolds testified that he did not request permission from any Coast Guard personnel and made sure that the Coast Guard Base Commander would not be on the Base during the time of the meeting. In organizing the Union meeting, Mr. Reynolds, as supervisor, pulled other guards from their positions, contrary to the Coast Guard contract requirements. As a result, Mr. Reynolds was demoted to Patrolman, and later suspended indefinitely. At some point during the meeting, the Union representatives passed out cards to be completed by employees attending the meeting. Afterwards, several employees questioned Mr. Rhodes with regard to the

Union cards, and indicated they were told that the cards were only to gather more information regarding the Union, when in actuality they were cards for joining the Union. He also received documentation from the National Labor Relations Board representative claiming that 13 of his employees had joined the Union. His concern for termination of his Coast Guard contract for failure to maintain the guards at their appropriate stations and for holding an unauthorized meeting on Coast Guard property prompted Petitioner Rhodes to prepare a questionnaire to be completed by employees. The survey gave each employee the option to complete the form. There was no testimony of coercion, interference or threats regarding the survey.

The other complainant to the National Labor Relations Board, Mr. Edwin Desiderio, stated that he made a slanderous remark against Mr. Rhodes during the union

meeting. Both Pro-Tech Security Network and the U.S. Coast Guard have policies against using abusive language. By letter, dated December 12, 1990, Mr. Desiderio was demoted and later suspended for his breach of the policy. However, on February 21, 1991, Mr. Desiderio was reinstated as Watch Commander, which was an equivalent position to that from which he had been demoted. Both Mr. Reynolds and Mr. Desiderio filed complaints with the National Labor Relations Board, joined by the International Union United Plant Guard Workers of America, after which a hearing before an Administrative Law Judge of the National Labor Relations Board was held. The finding of the Administrative Law Judge was that the Petitioner was engaged in unfair labor practices and was upheld by the National Labor Relations Board and by the Court of Appeals for the 4th Circuit.

ARGUMENT

I. The Court of Appeals erroneously concludes that the finding of the National Labor Relations Board that the federal government contract statement of work mandating certain contractor personnel as supervisors is without any effect in the current case, thereby misinterpreting the National Labor Relations Act and the Federal Acquisition Regulation.

In ordering the enforcement of the National Labor Relations Board Order of August 31, 1992, the Court of Appeals denies that the designation of certain contractor personnel as supervisory by the United States Coast Guard in the contract Statement of Work is conclusive in this case as a matter of law. Petitioner ProTech was determined to be a contractor with a substantial impact on National Defense by the Administrative Law Judge. The current Order of the Court works an injustice, in that ProTech, as a Government contractor, is told by the United State Coast Guard that it must comply with the

requirements of the contract or face default and punitive measures. When it then relies on the contract in good faith, it is then subjected to punitive measures by the National Labor Relations Board, as ordered by this Court of Appeals.

The termination of a Government Contract for Default is a substantial threat to deprive Petitioner of his interest in a form of property right. In effect, the National Labor Relations Board deprives Petitioner of the managerial means to discipline employees that violate his United States Government Contract.

In effect, one branch of the Federal Government -- the Executive, through the United States Coast Guard -- is directing Petitioner, under threat of loss of his contract, to maintain certain positions as supervisory, and to insure that posts designated in the contract are constantly manned; while another branch of the Government -- the National Labor Relations

Board -- penalizes Petitioner for supervising his contract to achieve the standards the Coast Guard has demanded of him.

In the current case, the supervisory personnel and their duties were specified in detail by Protech's Federal Government contract with the United States Coast Guard. Federal procurement regulations, known as the Federal Acquisition Regulation, have the force of law. G.L. Christian and Assoc., 320 F.2d 345 (Ct. Cl. 1963); John Reiner and Company v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. den., 377 U.S. 931. These regulations are promulgated by publication as Title 48 of the Code of Federal Regulations. 48 CFR 1.000 et seq.; 41 U.S.C. Section 405a. Further, this contract and all other similar Federal Government contracts have a clause included by reference and by operation of law entitled "Default (Fixed-Price Supply and Service)," which states,

in pertinent part:

> "The Government may, ... by written notice of default to the contractor, terminate this contract in whole or in part if the contractor fails to:
>
> (iii) Perform any of the other provisions of this contract ...."

48 CFR Part 49.402 et seq; Part 52.249-8. See, 48 CFR 1.000 et seq. These clauses are binding on the contractor even if it refuses to execute formal instruments showing its agreement to the default provisions. Thus, as a matter of law, it is included in the contract ProTech has with the United States Coast Guard. Fairfield Scientific Corporation v. United States, 611 F.2d 854 (Ct. Cl. 1979); Dravo Corporation v. United States, 480 F.2d 1331 (Ct. Cl. 1971); and Boston Pneumatics, Inc., 1963 BCA 3667 (ASBCA, 1963).

The Government required ProTech to maintain the general duties, watch positions, and watch routine as specified in the Government contract or else forfeit its contract and be assessed reprocurement costs. 48 CFR 49.402.6; and 48 CFR 49.402.7. The Administrative Law Judge and the National Labor Relations Board specifically found, as a matter of law, that the provisions of the contract were irrelevant. (App C pp. 78) Insofar as ProTech had to comply or face default, the determination by the United States Coast Guard that certain positions were supervisory should be binding as a matter of law on the Administrative Law Judge and the National Labor Relations Board under 29 U.S.C. Section 152. To do otherwise violates Petitioner's rights to equal protection of the laws without a rational basis for the discriminatory treatment, and clearly infringes on the Coast Guard's duty to maintain its bases in such a manner as

to promote and be consistent with National Security concerns as an arm of our armed forces.

> II. The Court of Appeals erred in affirming the National Labor Relations Board Order, thereby upholding the findings of the administrative law judge without substantial evidence of employer's motives, contrary to the employer's uncontradicted evidence, thereby depriving the petitioner of due process.

In treating as conclusive any of the Board findings of fact that are supported by substantial evidence on the record considered as a whole, the Circuit Court overlooks that it must carefully scrutinize the National Labor Relations Board's findings and record as to the supervisory status of the employees in questions. National Labor Relations Board v. St. Mary's Home, Inc., 690 F. 2d 1062 (4th Cir. 1982). It is well established by statute and case law that only employees are protected by the provisions of 29 U.S.C. Section 151. In the case under review, the

record contains substantial evidence that Mr. Desiderio and Mr. Reynolds were supervisors and therefore are not subject to the provisions of the National Labor Relations Act.

In addition, in ordering enforcement of the Order, the Circuit Court overlooks that the Administrative Law Judge and the National Labor Relations Board did not consider the uncontested testimony of Isaiah Rhodes, the proprietor of ProTech, who extensively outlined his motives in issuing the interrogatories to employees. This constitutes substantial evidence in this matter. The Court of Appeals has the right and the duty to reject a conclusion of the National Labor Relations Board which disregards or fails to give proper cognizance to uncontradicted or well-established facts. NLRB v. Winona Textile Mills, Inc., 160 F. 2d 201 (8th Cir. 1947); NLRB v. McCormick Concrete Company of South Carolina, Inc, 371 F.2d 149 (4th Cir.

1967). The findings of fact of the National Labor Relations Board are conclusive if substantially supported, yet, where its conclusion rests on inferences, such cannot prevail in the fact of direct evidence to the contrary. A. E. Staley Manufacturing Company v. NLRB, 117 F.2d 868 (7th Cir. 1940).

A finding of the Board without substantial evidence cannot be supported. McCormick, supra.; Portland Cement Company v. NLRB 915 F.2d 253, issued 919 F.2d 140 (6th Cir. 1990); See, NLRB v. Okun Brother Shoe Store, Inc., 825 F.2d 102, (6th Cir. 1987), cert. den. 485 U.S. 935, NLRB v. E.C. Atkins and Company, 331 U.S. 398 (1947). The finding of an unfair labor practice requires a showing of improper subjective intent. NLRB v. Brown, 380 U.S. 287, at 289, (1965). Improper subjective intent has not been shown in the evidence provided to the Board.

Finally, despite the admission of

contract provisions, the National Labor Relations Board did not take into consideration in its findings the sensitive nature of the contract, admitted in his findings by the Administrative Law Judge, in adjudging the intentions of ProTech's interrogatories concerning the gathering of both on and off-duty employees at a Government building, during the period of its contract, which was contrary to the provisions of the
contract, and which could subject it to termination for default.

CONCLUSION

As stated above, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the 4th Circuit.

RESPECTFULLY SUBMITTED, September 1, 1993.

THE BARR LAW FIRM, P.C.

by : Robert L. Barr Jr. (by LD)
ROBERT L. BARR, JR.
Counsel of Record for
Petitioner
GA. BAR NO. 039475

CERTIFICATE OF SERVICE

This is to certify that I have this day mailed a copy of Petitioner's Petition for a Writ of Certiorari and Appendix thereto by first class United States Mail, postage prepaid, to the following address:

National Labor Relations Board

This 4th day of October, 1993.

THE BARR LAW FIRM, P.C.

by : Robert L Barr Jr. (by DD2)
ROBERT L. BARR, JR.
Counsel of Record for
Petitioner
GA. BAR NO. 039475

Case No. _____

SUPREME COURT OF THE UNITED STATES

October 1993 Term

PRO-TECH SECURITY,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Appendix to
Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner,

v. NO. 92-2341

PRO-TECH SECURITY NETWORK,

RESPONDENT.

On Application for Enforcement of an Order of the National Labor Relations Board.
(11-CA-14209, 11-RC-5740)

Argued: May 5, 1993

Decided: June 8, 1993

Before ERVIN, Chief Judge, and NIEMEYER and WILLIAMS, Circuit Judges.

Enforcement granted by unpublished per curiam opinion.

ARGUED: John Emand Arbab, NATIONAL LABOR RELATIONS BOARD, Washington, D.C. for Petitioner, Brinkley Autry Faulcon, PENNY & BARNES, Elizabeth City, North Carolina, for Respondent. ON BRIEF: Jerry M. Hunter,

General Counsel, Yvonne T. Dixon, Acting Deputy General Counsel, Nicholas E. Karatinos, Acting Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Howard E. Perlstein, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Petitioner.

Ronald G. Penny, PENNY & BARNES, Elizabeth City, North Carolina, for Respondent.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

The question presented is whether

substantial evidence supports the National Labor Relations Board's ("Board") determination that respondent Pro-Tech Security Network ("Pro-Tech") committed unfair labor practices under sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("Act), codified at 29 U.S.C. U 158 (a)(1), (3). The issues were tried before an Administrative Law Judge ("ALJ") in May 1991. The ALJ rendered an exhaustive decision on September 24, 1991, finding that Pro-Tech had violated sections 8(a)(1) and 8(a)(1) of the Act. Pro-Tech filed exceptions with the Board . The Board subsequently affirmed the ALJ's findings of fact and conclusions of law, and adopted the ALJ's recommended order as its own.

In summary, the Board found (1) that Pro-Tech violated section 8(a)(1) of the Act by coercively interrogating its employees concerning their union activities, sympathies, and desires; and (2) that Pro-

Tech violated sections 8(a)(1) and 8(a)(3) of the Act by demoting employees Hassie Reynold and Edwin Desiderio and by thereafter discharging Reynolds.

The Act requires us to treat as conclusive any of the Board's findings of fact that are supported by substantial evidence on the record considered as a whole. See 29 U.S.C. U 160 (e)-(f); National Posters, Inc. v. NLRB, 885 F. 2d 175, 178 (4th Cir. 1989), cert. denied, 494 U.S. 1026 (1990). A reviewing court should not displace the Board's choice between two fairly conflicting views of the evidence "even thought the court would justifiably have made a different choice had the matter been before it de novo." Universal Camera Corp. NLRB, 340 U.S. 474, 488 (1951); see also NLRB v. Frigid Storage, Inc., 934 F. 2d 506, 509 (4th Cir. 1991) (identifying and applying Universal Camera Standard of review). Determinations of credibility made

by
the ALJ and adopted by the Board may be disturbed only when extraordinary circumstances exist, such as the ALJ's acceptance of testimony that, on its face, is unbelievable. J. Huizinga Cartage Co. v. NLRB, 941 F. 2d 616, 621 (7th Cir. 1991).

Our careful review of the record, the ALJ's recommended findings of fact, and the arguments of counsel discloses that substantial evidence supports the Board's finding that Pro-Tech violated sections 8(a)(1) and 8(a)(3) of the Act by interrogating, demoting, and discharging its employees because they engaged in protected union activities. Accordingly, we order the enforcement of the Board's order of August 31, 1992 forthwith.

ENFORCEMENT GRANTED

FILE COPY
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED July 7, 1993

No. 92-2341
11-CA-14209
11-RC-5740

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

PRO/TECH SECURITY NETWORK

Respondent

ORDER

Respondent has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Bert M. Montague

CLERK

000047 SDO

308 NLRB No. 90 D--3090

Elizabeth City, NC

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRO/TECH SECURITY NETWORK

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA)

DECISION, ORDER, AND DIRECTION

On September 24, 1991 Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

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[1] On December 2, 1991, the Union filed a letter in response to the Respondent's exceptions and brief, which stated that the Union opposed the exceptions and relied on any brief filed by the Genberal Counsel. The Respondent filed a motion to strike the letter, arguing that it did not comply with the Board's Rules for filing exceptions, cross-exceptions, and briefs. On December 23, 1991, the Union filed a second letter indicating that the prior letter may be understood as a notification that the Union

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has

decided to affirm the judge's rulings, findings, and

conclusions[2] and to adopt the recommended

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would not be filing an answer or brief. Based on this understanding of the Union's letter, we deny the Respondent's motion to strike.

[2] We agree with the judge that the Respondent did not demonstrate that it would have demoted and subsequently discharged employee Reynolds in the absence of his union activities. In his December 12, 1990 letter to Site Supervisor Simons, Owner Rhodes clearly stated that he was demoting Reynolds "[s}o that he can perform his duties for the union." We note that Reynolds' discharge was based on the same events as his demotion, suggesting that it was prompted by the same unlawful motivation. Moreover, the Respondent did not show that Reynolds violated established rules by allowing the union representatives into the main gate guardhouse, where members of the public wait for authorization or an escort before proceeding onto the Coast Guard base. As the judge found, Watch Commander Foreman and patrol person Evans, who were on duty prior

Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the respondent, Pro/Tech Security Network, Elizabeth City, North Carolina, its

officers, agents, successors, and assigns,

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to Reynolds' shift, invited the union representatives to wait for Reynolds in the guardhouse, although the union representatives declined. Foreman and Evans were not disciplined. The Respondent also asserts that it disciplined Reynolds for arranging the union meeting without authorization and attending the meeting on duty time, but it did not provide those reasons at the time of discharge, nor did it discipline the other employees who attended part or all of the session on duty time. Based on the Respondent's disparate treatment of Reynolds and its shifting reasons for the actions against him, we conclude that the Respondent unlawfully demoted and discharged Reynolds as a result of his protected union activities.

shall take the action set forth in the order.

IT IS FURTHER ORDERED that case 11--RC--5740 is severed and remanded to the Regional Director for Region 11 for the purpose of conducting a second election at such time as the Regional Director deems appropriate.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.Also, eligible are employees engaged in an economic strike that began less than 12 months before

the

election date and who retained their employee status during the eligibility period and their replacements.

Those in the military service may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or have been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union, United Plant Guard Workers of America.

To ensure that all eligible voters have the opportunity to be informed of the issues

in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision and Direction of Second Election. The list may initially be used by the Regional Director within 7 days from the date of

this Decision and Direction of Second Election. The list may initially be used by the Regional Director to assist in determining an adequate showing of interest. The Regional Director shall make the list available to all parties to the election when he has determined that an adequate showing of

interst has been made. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. August 31, 1992.

James M. Stephens, Chairman

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Section 103.20 of the Board's Rules concerns the posting of election notices. Your attention is directed to the attached copy of that Section.

[THE ADMINISTRATIVE LAW JUDGE'S OPINION IS INCLUDED AT APPENDIX C]

000025

JD (ATL)--38--91
Elizabeth City, NC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

PRO-TECH SECURITY NETWORK

and

CASE 11-CA-14209
11-RC-5740

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA)

Paris Favors, Esq., for the General Counsel.
Brinkley A. Faulcon, Esq. (Penny & Barnes), Elizabeth City, NC, for the Company.
Lisa Lane, Esq. (Gregory, Moore, Jeakle, Heinen, Ellison & Brooks), Detroit, MI, for the Union.

DECISION

Statement of the Case

WILLIAM N. CATES, Administrative Law Judge. International Union, United Plant Guard Workers of America (UPGWA), (Union), filed an unfair labor practice charge[1] against Pro-Tech Security Network (Company)

[1] The charge was twice amended.

on December 24, 1990.[2] After investigating, the Regional Director for Region 11 of the National Labor Relations Board (Board), as an agent of the Board's General Counsel, issued a Complaint and Notice of Hearing (complaint) against

the Company on February 7, 1991. I hear the case in trial at Elizabeth City, North Carolina, on May 20 and 21, 1991.

In substance, the complaint alleges the Company interrogated its employees concerning their union activities, sympathies, and desires, and that on or about December 16, it demoted its employees Hassie Reynolds (Reynolds), and Edwin Desiderio (Desiderio); and on or about December 31, terminated Reynolds' employment and has thereafter failed and refused to reinstate him. The actions of the Company are alleged to have

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[2] All dates are 1990 unless I indicate otherwise.

violated 8(a)(1) and (3) of the National Labor Relations Act (Act). An issue in

deciding the allegations herein is whether Reynolds and Desiderio were, at relevant times, supervisors within the meaning of Section 2(11) of the Act.

The Company, in its timely filed answer, denied the commission of any unfair labor practices.

In a Supplemental Decision, Direction, and Order Consolidating Cases, the Regional Director for Region
11 of the Board on February 22, 1991, consolidated certain of the Union's (Petitioner's) Objections to Conduct Affecting the Results of the Election (held on February 5, 1991) in Case 11-RC-5740 with the above-referenced unfair labor practices

in Case 11-CA-14209.

I have carefully considered the trial record and post trial briefs of Counsel for the General Counsel and the Company. I observed the demeanor of the eight witnesses as they testified. Based on the above, and as explained below, I conclude that at relevant times herein Reynolds and Desiderio were not supervisors within the meanings of the Act and that the Company violated the Act substantially as outlines in the complaint. Accordingly, I have recommended certain remedial action including the reinstatement of Reynolds and that he along with Desiderio be made whole for any losses they might have suffered as a result of the Company's unlawful actions and that the Company post a notice, and that the election held on February 5, 1991, be set aside and a new election held.

Findings of Fact

I. Jurisdiction

The Company is a sole proprietorship licensed to do business in the State of North Carolina with an operation located at the United States Coast Guard Base Support Center at Elizabeth City, North Carolina, where it is engaged in providing security services. During the 12 months preceding issuance of the complaint herein, the Company performed services valued in excess of $5,000 for various enterprises located in states other than the State of North Carolina. Based upon a projection of its operations since on or about August 16, the Company, in the course and conduct of its operations, will annually perform security services valued in excess of $50,000 for the Coast Guard at its Elizabeth City, North Carolina, facility. The operations of the Company have a substantial impact on the national defense of the United States. The complaint alleges, the parties admit and I find, the Company is, and at

material times herein has been, an employer engaged in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The complaint alleges, the parties admit, the evidence establishes, and I find, the Union is a

labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The following factual overview has for the greater part been set forth in chronological order.

Pursuant to a bidding process, the Company commenced providing security guard

service at the Coast Guard facility located at Elizabeth City, North Carolina, on August 16. Prior to that time (at least since 1981), security had been provided by S & C Security of Charlottesville, Virginia. As had its predecessor, the Company employs approximately 14 employees. The Company is owned and managed by Isaiah Rhodes (Rhodes). At times material herein, there was one site supervisor, Captain Howard Simons (Simons); one lieutenant watch commander, Lieutenant Reynolds (an alleged discriminatee), two sergeant watch commanders Sergeant Desiderio (an alleged discriminatee), and Sergeant Joanne Foreman, and approximately 10 patrol persons.[3]

The Company provides security for the Coast Guard 24 hours per day, 7 days per week. The Company accomplished its task with three 8-hour shifts per day with three

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[3] At some point herein, the Company ceased referring to its watch commanders by rank and title and simply stated calling them watch commanders.

persons per shift, namely a watch commander, a main gate patrol person, and a roving patrol person. All company personnel wear uniforms[4] and carry side arms.

Watch Commander Reynolds testified that after the Company assumed the task of providing security for the Coast Guard, that employees, around the latter part of September or the early part of October, started talking about the possibility of union representation. Reynolds testified that around November 1, approximately six employees[5] talked during shift change about whether there was sufficient interest in union representation to pursue the matter. Reynolds said employees became interested in

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[4] All employees on each shift wear identical uniforms (black trousers with white shirts), however, the watch commanders wear white baseball type hats while the patrol persons wear black ones. Watch commanders wear gold badges whereas patrol persons wear silver badges.

[5] According to Reynolds, he and Desiderio along with employees Overton, Gordon, Carver, and Roberts were the ones who participated in the discussion.

possibly seeking union help after the Company ceased paying 59 cents per hour for benefits and 67 cents per day for uniform maintenance. Reynolds testified certain employees felt owner Rhodes had misrepresented the Company's role in attempted to obtain a better wage rate for the employees than they actually received. During discussions on these matters, patrol person Carver volunteered to obtain a list of union representatives if Watch Commander Reynolds would contact one or all of the representatives. Reynolds testified that within a day or so, Carver provided him a list of three or four union representatives. Thereafter, a representative of the Union herein contacted

Reynolds and also mailed him pamphlets and union cards for distribution.[6] Reynolds and

[6] Reynolds testified the union representative mailed him two different pamphlets describing the Union and what it

others distributed the literature and union cards to the employees. Reynolds testified he received a second telephone call from the same union representative on November 21, in which the Union's representative asked if he could arrange a meeting of the employees for November 24, so the representative could ascertain if there was sufficient support for the Union to file a representation petition with the Board on behalf of the employees.

A meeting took place on November 24, at the main gate guard house between approximately 1:30 and 3:15 p.m. According to Reynolds, the guard house is only large enough for 0 to 12 adults to stand in and is the main point of entry on or off the Coast Guard facility.

Reynolds said no one is allowed to enter the Coast Guard facility without identification or clearance. Reynolds explained Coast Guard personnel are provided decals for their automobiles or they are

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could do for the employees.

asked to show military identification when entering the facility. If anyone from the general public visits the facility, they must, according to Reynolds, proceed to the main gate guard house and contact the person they wish to visit. That person must then escort or voucher the guest onto the facility.

Reynolds testified the two union representatives that came to the on November 24 followed the above-outline procedure for guest at the facility on that they came to the main gate guard house.[7]

Relief Watch Commander Foreman as well as patrol person Evans both testified they observed the two waiting in an automobile at the gate. Both asked them what they wanted. Both testified the representatives told them they were from the Union

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[7] Reynolds testified he did not clear the two union representatives' visit to the facility with anyone from either the Company or the Coast Guard.

and were waiting for Watch Commander Reynolds. Foreman and Evans each invited the two Union representatives into the main gate guard house to wait for Reynolds[8] but both declined to do so.

Reynolds was the watch commander on duty during the time the employees met with the two union representatives. Gordon was the main gate patrol and Overton the roving patrol during the guard house meeting. Gordon remained at his duty station during the entire meeting except for a brief period when Overton relieved him so that he (Gordon) could participate in the meeting.[9] Overton did not commence his roving patrol duties until

[8] Foreman said there was nothing unusual about allowing visitors to wait in the guard house.

[9] The meeting took place on Saturday following the Thanksgiving holiday. Reynolds testified the base was practically deserted resulting in little, if any, traffic through the main gate.

the meeting ended. Reynolds attended the entire meeting. Nine employees, in addition to the two union representatives, attended the meeting.

Patrol person Evans testified "everybody said a little something" at the meeting and "asked questions." Reynolds testified the meeting was "basically an information type meeting" with "numerous questions." Desiderio, who was off duty and attended the meeting in civilian dress, testified:

> Well, there were -- they were just talking about what we can do to -- the whole Union meeting was -- the meeting was so we could see what we could do to get our uniform pay and holiday pay and everybody, I mean -- everybody was dissatisfied with what was going on up there and I

made the comment of, let's screw the bastard, I think -- I'm not sure that's exactly what I said . . .

Site supervisor Simons testified that a couple of employees telephoned him at home after the meeting and "more or less" filled him in on what had taken place. He said Owner Rhodes called him on Monday November 26 and that Rhodes "had already been advised of [the union meeting] just like I had." Simons said Rhodes was "upset" because the meeting had taken place on Company time. Rhodes testified "I was more or less pretty well vexed because of the fact they did it on Company time. Not only was I vexed because of this -- because I knew it was a breach of the contract between me and the government and it could reflect that I could lose the contract."

Owner Rhodes testified he already had an inspector in Elizabeth City, North Carolina,

so he instituted an investigation to ascertain what had taken place. Rhodes also went to Elizabeth City and helped investigate the matter. He said he determined that no unusual occurrences had been reflected in the front gate log book for November 24. He stated all unusual occurrences should be reflected in the front gate log book.[10]

Reynolds testified that after the November 24, union meeting, he worked November 25 and 26 but was off from work November 27. Reynolds said nothing unusual happened on those days but that when he returned from work on November 28, Site Supervisor Simons told him "be careful what you say, Mr. Rhodes knows all about your meeting, who was there, what took place." Reynolds further testified, "Captain Simons told me that Mr. Rhodes had told him that the employees are going union or either have gone union and that let them go ahead and have

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[10] Rhodes testified the visit to the base by the two union representatives would have been an "unusual occurrence."

their fucking union, that he could bargain with it."

On December 10, the Union filed a representation petition with the Board in Case 12-RC-7393.[11]

On December 12, Owner Rhodes wrote Site Supervisor Simons the following letter which was posted at the Company that day and was personally given to Reynolds by Simons on December 14. The letter reads:

Captain W. H. Simons

Main Gate

USCG

Elizabeth City, N.C.

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[11] The petition was originally filed with Region 12 of the Board in Tampa, Florida, inasmuch as the Company has an office in Orange Park, Florida. The petition was, however, processing by Region 11 of the Board and designated as Case 11-RC-5740.

Enclosed you will find documents forwarded to this office by the National Labor Relations Board. As noted in the petition filed, Section 6a there are thirteen (13) employees who have signed with the union.[12]

The employees have a right to have representation by a union, if they feel that no one in the organization can properly represent them and as a group do not know how to bargain themselves. However, since there are only 14 employees at the site and four are in a

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[12] It is noted that paragraph 6a of the petition reads "Number of Employees in the Unit" not the number of employees that have signed with the union.

Supervisory position, there is definitely a conflict of interest and INTIMIDATION for or against the union will not be tolerated. Please note page 2 (two) of enclosed.

It is my understanding that Supervisory personnel cannot engage in union activities and be a part of management.

Therefore effective December 16, 1990 and pending further investigation.

Lt. Reynolds will be reduced to patrolman grade. So that he can perform his duties for the union.

Sgt. Desiderio will also be reduced to patrolman.

Sgt. Foreman will be elevated to Lieutenant directly under your supervision and will act as Site Supervisor in your absence.

Patrolman Jack Gordon with your approval will be elevated to Sgt. Watch Commander as he have the experience.

Patrolman Williams with your approval will be elevated to Sgt. Watch Commander as he have the education and experience.

The promotions in no way is to influence them or persuade them in any manner and they are to be instructed of this. They are free to decline the promotions without prejudice by Pro-Tech. Although Patrolman Gordon and Williams might have participated in the Union activities they were not Supervisors at the time. If they decline to accept the position, Pro-Tech will assign some one qualified & familiar with Pro-Tech's policies.

Effective January 1, 1991:

Pro-Tech Security Network will have an office in Elizabeth City to conduct

> business a District Manager will be assigned. This will in no way affect your position as Site Supervisor.
>
> /s/ I. R. Rhodes

As reflected in the letter, Reynolds was reduced to a patrol person[13] as of December 16, and served in that capacity until late December. In that regard, Reynolds testified he worked December 29, but was not scheduled to work December 30 or 31. Reynolds said he was to have reported for work on January 1, 1991, but did not because of a telephone call he received from Site Supervisor Simons on December 31. Reynolds testified, without contradiction, that Simons told him "I do not know how to begin this conversation, but you're suspended until I recall you."

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[13] The reduction resulted in Reynolds' pay being cut 95 cents per hour.

Reynolds asked why and was told it was for a failure to perform supervisory duties. Reynolds testified he was not given any documentation at any time regarding his suspension.

Desiderio said Site Supervisor Simons told him on December 12 to post Owner Rhodes' letter on the bulletin board. Desiderio said he asked Simons if Rhodes could do what was outlined in the letter and that Simons said he didn't know.

As reflected in Owner Rhodes' letter, Desiderio was demoted from sergeant to patrol person effective December 16.

Desiderio was given a written warning by Site Supervisor Simons on December 31 on which it was checked the warning was for his having engaged in "abusive and/or threatening language and/or behavior." More

specifically, the warning reflected "abusive language in regard to statement made towards Gen. Manager (let's screw the bastard)." On the warning Desiderio was demoted from sergeant to patrol person. Desiderio testified that patrol person McCoy handed him a copy of the warning at the main gate and that Watch Commander Williams thereafter spoke with him about it.

On or about December 30, Owner Rhodes personally distributed the following survey to his employees:

> TO: PRO-TECH SECURITY NETWORK
> ATTN: I.R. RHODES/GEN MGR
> In regards to the meeting held on November 24, 1990, between the hours of 1:30 p.m. - 3:10 p.m.
> PLEASE NOTE THAT THE CARD

THAT YOU SIGNED WAS TO JOIN A UNION!!!

I was not misinformed about the Union, when I signed the card to be best of my knowledge.

Yes _____ No _____

I was misinformed when I signed the card and did not at that time intend to join the Union.

Yes _____ No _____

I understood that by signing the card that it was just to listen to a representative from the Union.

Yes _____ No _____

I would rather not comment.

Yes _____ No _____

I did not sign the card.

Yes _____ No _____

Signed: _____

Dated: _____

Watch Commander Foreman testified Owner Rhodes asked the employees to read and sign the survey.[14]

Owner Rhodes testified he prepared and distributed the survey after receiving a copy of the representation petition from the Board. He said that based on the petition he though 13 employees had already joined the Union. He testified he felt "it was almost impossible for 13 people to have signed with the Union." Rhodes said he simply wanted to

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[14] Various signed copies of the survey were received in evidence.

find out the truth and see if that number of employees had already joined the Union.

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On January 3, 1991, the Board conducted a hearing in the representation case in Elizabeth City, North Carolina. Reynolds and Desiderio were among those testifying at that proceeding. On January 11, 1991, the Regional Director for Region 11 issued his Decision and Direction of Election in the representation case in which he concluded that sergeant and lieutenant watch commanders were not supervisors within the meaning of the Act.[15] The unit found appropriate by the Director follows:

> All full time and regular part-time security officers, including the

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[15] No request for review of the Director's decision was ever filed.

assistant site supervisor and watch commander performing guard duties and employed by the Employer at the United States Coast Guard Base Support Center, Elizabeth City, North Carolina; but excluding all other employees, office clerical employees, and supervisors as defined in the Act.

At the January 3, 1991, representation hearing, Site Supervisor Simons issued Reynolds a written disciplinary warning that reflected he was "suspended indefinitely" for "unsatisfactory work performance," "falsification or improper handling of records," "improper conduct," and "allowing unauthorized persons on base." More

specifically, Simons noted Reynolds had failed to perform his duties as a supervisor by allowing a patrol person to remain at the gate and by allowing unauthorized persons on the base on November 24.

On February 5, 1991, the Board conducted a secret ballot election among the Company's 15 eligible voters that resulted in 7 votes for and 7 notes against union representation. There were no challenged or void ballots. On February 12, 1991, the Union filed timely objections to conduct affecting the results of the election. As noted elsewhere in this Decision, the Regional Director ordered certain conduct related thereto be considered with the unfair labor practice allegations herein.

Desiderio testified that on February 20, 1991, he received a telephone call from Owner Rhodes. Desiderio testified:

> [Rhodes] . . . asked how I was doing and I asked how he was doing. He said that, I was wondering would you want your job back? That kind of stunned me, because I mean -- I don't know, but I asked him why. He said, 'Because I think you're capable of doing the job.' And he says, you know, you've got your job back and that was it.

Desiderio said no mention was made about what had taken place at the November 24 meeting. Desiderio said he because a watch commander effective

the next day (February 22, 1991) and that his pay was restored to the scale he enjoyed

before his demotion.[16]

Owner Rhodes testified he demoted Desiderio because what Desiderio had said "was a reflection on my parents that I'm a bastard." Rhodes said it was against Company policy to use abusive language. Rhodes testified he reinstated Desiderio as a watch commander because it had been reported to him that Desiderio was a good worker. Rhodes said Desiderio promised he would not use profanity any more.

In deciding whether the questionnaire Owner Rhodes prepared and distributed to his employees constituted unlawful interrogation,[17] I shall be governed by the Board's Decision in Rossmore House, 269 NLRB

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[16] Desiderio said he was not made whole for the wages he lost between December 16 and February 22, 1991.

[17] It is of no moment that the questions under consideration herein were presented to the employees in written form as opposed to oral questions.

1176 (1984), enfd. sub nom. Hotel Employees & Restaurant Emp. Union v. NLRB, 760 F 2d 1006 (9th Cir. 1985). In Rossmore House, the Board held the lawfulness of questioning by employer agents about union sympathies and activities turns on the question of whether "under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." The Board in Rossmore House note the Bourne[18] test was helpful in making such an analysis. The Bourne test factors are as follows:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g. did the interrogatory appear to be seeking

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[18] Bourne Co. v. NLRB, 332 F 2d 47 (2d Cir. 1964).

information on which to base taking action against individual employees?

(3) The identity of the questioner, i.e. how high was he in the company hierarchy?

(4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality'?

(5) Truthfulness of the reply.[19]

First, I note that Rhodes, as owner and general manager of the Company, was at the time and continues to be the highest official

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[19] The Bourne test has been cited with approval by various circuits. For a partial listing of those circuits, see Chauffeurs, Teamsters & Help., Loc. 633, N.H. v. NLRB, 509 F. 2d 490, fn. 15 (D.C. Cir. 1974).

of the Company. In his survey, Rhodes specifically asked employees to indicated whether or not

they signed a union card. Rhodes implies in his survey that he knows or at least learns about union meetings of his employees when such meetings take place. Although Rhodes in his survey allowed employees to indicate that they would rather not comment, he did not, however, provide assurances to the survey and he wanted the surveys signed. Rhodes stated reason for the survey -- that he felt it was impossible for the number of employees to have signed up with the union that had done so -- does not constitute legal justification for his survey.[20] The record

[20] I am not unmindful that Site Supervisor Simons testified Rhodes told him he surveyed the employees because two or three of them had indicated they did not realize they had joined the union when they signed their union card. Such does not alter the out come herein. First, Rhodes did not

does not reflect which employees responding to the survey had openly expressed their sentiments toward the Union prior to the survey.

In Light of all the circumstances, I find the company, through Owner Rhodes' survey, violated Section 8(a)(1) of the Act as alleged at paragraph 9 of the complaint.

Before addressing the issue of whether Reynolds and Desiderio were, at material times herein, supervisors within the meaning of the Act, it is helpful to review Section 2(11) of the Act and examine certain Board principles related thereto.

Section 2(11) of the Act reads:

> The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall promote, discharge, assign, reward,

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give that as his reason for the survey. Second, I note, Simons had no input with respect to the survey and testified no one had complained to him they had been misled with respect to the union cards.

> or discipline other employees, or grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The statutory indicia outlined above in Section 2(11) of the Act are in the disjunctive and only one need exist to confer supervisory status on an individual. See, e.g. Miller Electric Company, 301 NLRB No. 41 at ALJ sl. (1986). However, in order for supervisory status to exist, the exercise of one or more of the above outlined powers must be accomplished with independent judgment on behalf of management in other than a routine or clerical manner. As noted in Hydro Conduit Corp., 254 NLRB 433 (1981), the statute insists that a supervisor (1) have authority, (2) to use independent

judgement, (3) in performing such supervisory functions, (4) in the interest of management. These latter requirements are conjunctive. The burden of proving supervisory status rests on the party alleging that such status exists. See, e.g., California Beverage Company, 283 NLRB 328 (1987). An employer's holding out an individual to employees as a supervisor is not necessarily dispositive of supervisory status. PHT, Inc., d/b/a Polynesian Hospitality Tours, 297 NLRB No. 30 (Nov. 14, 1989). An individual's status as a supervisor is not determined by the individual's title or job authority. See, e.g., Mack's Super Markets, Inc., 283 NLRB 1082 (1988). Isolated or sporadic exercise of Section 2(11) authority is insufficient to predicate a supervisory finding on. Likewise, employees who are merely conduits for relaying management information to other employees are not true supervisors.

California Beverage Company, supra. However, supervision of even one employee is sufficient if one or more of the supervisory indicia are met. Opelika Foundry, supra. As noted in Passavant Health Center, 284 NLRB 887 (1987), "[i]t is well established that merely issuing verbal reprimands is too minor a disciplinary function to be statutory authority" and "the mere factual reporting of oral reprimands and the issuance of warnings that do not alone affect job status or tenure do not constitute supervisory authority." Additionally, being able to keep things running smoothly is insufficient to confer supervisory status on an individual. California Beverage Company, supra. In summary, the proper consideration is whether the functions, duties, and authority of an individual, regardless of the title given the individual, meet any of the criteria for supervisory status set out in Section 2(11) of the Act. See, e.g., Waterbed World, 286 NLRB 425 (1987). Finally, as was noted in

McDonnell-Douglas Corp. v. NLRB, 655 F.2d 932 at 936 (9th Cir. 1981), it is important for the Board not to construe supervisory status too broadly for a worker who is deemed a supervisor [*sic*] loses his/her organizational rights.

In agreement with Counsel for the General Counsel, and in harmony with the Regional Directors's determination in the underlying representation case, I find Reynolds and Desiderio as watch commanders were not at material times herein supervisors within the meaning of the Act. The fact the Company's contract with the Coast Guard refers to watch commanders as supervisors is not controlling. In the contract, it is stated watch commanders shall "supervisor [*sic*] main gate patrolman and the roving patrolman," however, the evidence clearly establishes the patrol persons' duties are simple and routine and are based upon detailed schedules prepared by the site supervisor (Simons) without input

from the watch commanders. In this regard, Site Supervisor Simons testified "90%" of the watch commander's duties are "repetitious" and even on the other 10% the watch commanders contact the Coast Guard's Officer of the Day to ascertain how things should be handled. Watch commander's duties do no [*sic*] involve the exercise of any independent judgment. Watch commanders do not even assign work in that patrol persons simply follow the work schedules posted by the site supervisor. Each patrol person has a written description of his or her duties and he or she performs such duties without guidance or input from the watch commanders. Watch commanders cannot grant employees time off or permission to leave work early. A watch commander may prevent an out of

uniform patrol person from assuming his or her duties by having the patrol person

already on duty remain on the job until the patrol person reporting for work is in proper uniform or a replacement has been located. However, even with respect to this limit [*sic*] authority, there is no evidence that such occurs with any frequency. Such limited and sporadic exercise of authority does not point to an important indicator of supervisory authority.

The evidence is quite clear that watch commanders do not have or exercise any authority with respect to hiring, transferring, suspending, laying off, recalling, promoting, discharging, or rewarding employees not that watch commanders have or exercise any authority with respect to adjusting employee grievances.

There is evidence that a watch commander can direct the roving patrol person to, as was the example herein, the site of an aircraft crash at the base. However, the base

fire chief assumes overall control of a crash at the after the fire chief arrives on the scene. This isolated exercise of Section 2(11) authority in a truly emergency situation is insufficient to predicate a supervisory finding on. Likewise, in those possible situations might direct the roving patrol person to the scene until the Coast Guard Officer of the Day could be summoned is insufficient authority to confer supervisory status on watch commanders.

With respect to disciplining employees, the record establishes that watch commander Reynolds on one occasion orally admonished a patrol person not to engage in or continue speaking on matters about which the patrol is simply too minor a disciplinary function to confer supervisory authority on Reynolds or the other watch commanders.

The fact that things may run smoothly at the base with two patrol persons and a watch

commander on each shift does not establish that the watch commanders are supervisors within the meaning of the Act.

Finally, I note the watch commanders are hourly paid and have similar benefits as other patrol persons.

In summary, I conclude and find watch commanders are not supervisors within the meaning of the Act.

Having determined that Reynolds and Desiderio were not supervisors within the meaning of the Ace, I shall now consider whether their demotions and Reynolds' discharge violated Section 8(a)(3) and (1) of the Act.

In Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) and (1) of the Act turning, as does the instant case, on employer motivation. First, Counsel for the

General Counsel must make a

prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision.

Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.

That Reynolds' and Desiderio's demotions grew out of the November 24, meeting is not disputed. It is helpful in deciding the issues herein to make a preliminary determination as to whether the meeting on November 24, constituted concerted protected activity. The employees sought the meeting with representatives of the Union based on, among other considerations, the fact certain of their benefits had been eliminated which

impacted their overall wages.[21] Thus, based on the above, and absent other considerations discussed below, I am in agreement with Counsel for the General Counsel that those attending the November 24, meeting (including Reynolds and Desiderio were engaging in protected conduct.

Having concluded the employees' conduct on November 24 was protected only addresses part of the overall concerns regarding that meeting. It must also be decided whether the meeting lost its protected status in that it was held on Coast Guard property during working time without permission from the Company or the Coast Guard. I am, for the reasons that follow, persuaded the meeting did not lose its protected status simply because it took place on Coast Guard property without permission during working time. First, the meeting was held at the main gate

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[21] The Company had ceased paying 69 cents per hour as a benefits allowance and 67 cents per day per employee for uniform maintenance.

guard house which is open to the general public in that members of the general public may come to and wait in that area until they are escorted or vouchered onto the base itself. Thus, the representatives from the Union were treated as other members of the general public would have been. In that regard, I note the Coast Guard hosts or permits many events on base that are attended by members of the general public. Such events include "weddings, banquets, [and] parties." Additionally, the Chief Petty Officer's Association of the Coast Guard sponsors bingo games each Wednesday at the base and the general public is invited and encouraged to attend and/or participate in the games. Thus facilities of the Coast Guard are utilized by members of the general public in much the same way as the Union representatives did when they met with the employees. Additionally, it has not been shown that the employees' meeting at the main gate guard house interrupted the operations

of the Coast Guard in any manner. the meeting took place on Saturday following the Thanksgiving holiday. It is undisputed that traffic and/or movement on the base was at a very minimum that day. Furthermore, the gate guard patrol person remained at his duty station (except for a brief time when the roving patrol person relieved him) during the time of the employees' meeting with the Union representatives. Site Supervisor Simons testified, that to his knowledge, no unusual occurrences took place at the base as a result of the employees attending the meeting in question. I note that although Owner Rhodes learned of the meeting shortly after it took place, he did not notify

the Coast Guard until sometime will after that date. Coast Guard Chief Petty Officer Piner, the Coast Guard's Contracting Officer Technical Representative, testified the

Company's contract was not jeopardized in any manner as a result of the employees November 24, meeting with the Union representatives. To summarize this concern, I find the November 24, employees' meeting with the representatives of the Union did not lose its otherwise protected status simply because it was held without permission during working time on Coast Guard premised.

Having concluded that the employees attending the meeting were engaging in protected conduct which did not thereafter lose its protected status, I shall consider whether Counsel for the General Counsel established a prima facie showing that protected conduct was a motivating factor in the Company's decision to demote Reynolds and Desiderio and to thereafter discharge Reynolds. I find Counsel for the General Counsel made such a showing. The General Counsel, as shown below, demonstrated that Reynolds and Desiderio each engaged in protected conduct which was known to the

Company and that the Company thereafter took action against the two at least in part as a result of their participation in the protected conduct. First, Reynolds was the employee who contacted the Union. It was through Reynolds that the Union's representatives made their arrangements for the November 24 meeting. Reynolds was the employee who contacted other employees about attending the November 24 meeting. The union officials, upon arrival at the main gate guard house on November 24, told at least two employees they were there to meet Reynolds and they thereafter conducted a meeting attended by Reynolds and other interested employees. Owner Rhodes and Site Supervisor Simons were informed of the meeting shortly after it occurred. Site Supervisor Simons even warned Reynolds on the next working day following the weekend meeting that "Mr. Rhodes knows all about your meeting, who was there, and what took place." (Emphasis added) Thus, it is clear the Company was well aware

of Reynolds' involvement with and attendance at the meeting. Owner Rhodes knew Desiderio's sentiments in that Desiderio stated at the meeting, with respect to the employees dissatisfaction with the Company and Owner Rhodes in particular, "let's screw the bastard." Counsel for the General Counsel established the Company's animus toward the employees protected activities through Owner Rhodes' December 12 letter to the employees in which Rhodes demoted Reynolds from lieutenant watch commander to patrol person because of Reynolds' union activities. Specifically, Owner Rhodes wrote "Lieutenant Reynolds will be reduced [effective December 16] to patrol grade so that he can perform his duties for the union." Rhodes also wrote that "Sergeant Desiderio will also be reduced to patrolman." Rhodes' overall animosity toward the employees union activities is further demonstrated by the survey be prepared, provided to and asked the employees to sign

in which he unlawfully interrogated them about their union sentiments. In light of all the above, I am fully persuaded Counsel for the General Counsel demonstrated protected conduct was a motivating factor in the Company's decision to demote Reynolds and Desiderio and to thereafter discharge Reynolds.[22]

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I am persuaded the Company failed to meet its burden of demonstrating it would have demoted Desiderio even in the absence of any protected conduct on his or the other employees' part. Owner Rhodes testified he demoted Desiderio based on what Desiderio said about him at the November 24, union meeting. Rhodes explained Desiderio's comments were "a reflection on [his] company policy for employees to use abusive language. A careful review of the evidence convinces me

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[22] The Company acknowledged Reynolds' discharge was for the same reasons he was demoted.

those were not the real reasons for Desiderio's demotion but rather were simply matters seized upon by Rhodes to punish Desiderio for his support of the Union and the concerns related thereto. While the Company did have a published rule against the use of abusive language, such had never been enforced prior to the Company's disciplining issued a warning or reprimand to anyone for using abusive language since the Company assumed its contractual duties for the Coast Guard. Desiderio, patrol person Evans, and Watch Commander Foreman all testified they had cursed on the job and had heard others do so. Patrol person Evans testified Desiderio use language similar to that used at the November 24, meeting and that he had done so in the presence of Site Supervisor Simons. Foreman recited an example where Desiderio referred to a person entering the main gate as "that bitch" and that Site Supervisor Simons, who was standing there, simply said "Desi, one of these days I'm going to wash

your mouth out with some soap." Site Supervisor Simons admitted making such comments to Desiderio. Simons also testified about meetings he had held with employees and stated "[v]ery few meeting would we have that somebody won't say a cuss word at one time or another." Simons added "very few of us haven't throwed out a damn or something at one time or another." That Rhodes' true motivation or concern was not the language Desiderio admittedly used is further demonstrated by the language Site Supervisor Simons attributed to Rhodes in Rhodes' description of the employees' union activities. In that Rhodes' feelings about the Union as the employees could "go ahead and have their fucking union." In light of all the above, the evidence is overhwelming that Owner Rhodes' concern was not about abusive language but rather was about the union and the concerted protected activities of the employees and specifically Desiderio's participation therein. If Owner Rhodes' true

concern had been the language used by one of his employees, he would have sought Site Supervisor Simons input before deciding to discipline Desiderio. In summary, I find the Company failed to demonstrate it would have demoted Desiderio in the absence of protected conduct on his and other employees' part.

The Company also failed to demonstrate it would have demoted Reynolds from lieutenant to patrol person even in the absence of protected conduct on his part. That fact is most clearly demonstrated by Owner Rhodes' December 12, letter to all employees in which he wrote "Lieutenant Reynolds will be reduced to patrolman grade so that he can perform his duties for the union." It is clear that Reynolds was, as the Company perceived him to be, the

moving force behind the Union's efforts at the Company. It is just as clear the Company

demoted him for just that reason.

The Company further failed to demonstrate it would have discharged Reynolds, as it did on December 31, in the absence of protected conduct on his part. First, I note the Company informed Reynolds of his discharge while he was present to testify at the Board conducted hearing in the underlying representation case. The timing and location of the notification suggests an unlawful motive. The impact of the Company's timing and place of notification could not have gone unnoticed by the employees. Reynolds' discharge, which ostensibly was for a failure to perform the duties of a supervisor and for allowing unauthorized persons on the base, does not withstand close scrutiny. First, Reynolds was not a supervisor within the meaning of the Act. Second, if the Company's motivation for disciplining Reynolds had been his allowing unauthorized persons on the base, a question arises as to why the Company did not also discipline Relief Watch

Commander Foreman and patrol person Evans as well. They both observed and spoke with the two "unauthorized" union representatives while still duty and both invited the "unauthorized" union representatives to wait in the main gate guard house. The inference is clear Foreman and Evans were not employee leaders (as Reynolds and Desiderio were perceived to be) in the movement to bring the Union in at the Company. If the Company's motivation for disciplining Reynolds had been for his failure to perform his duties, then a question is raised as to why the Company did not also discipline roving patrol person Overton who admittedly did not perform his assigned duties until the conclusion of the union meeting. Again, an inference is warranted that the two were treated differently because Reynolds was the leader of the efforts on behalf of the Union at the Company. Further, if the Company's overall concern was that the meeting somehow jeopardized its contractual relationship with

the Coast Guard, why did it only discipline two of the nine employees attending the meeting. Again it appears the Company was interested in disciplining those responsible for bringing the Union to the Company. In summary, the evidence warrants the finding, which I make, that it was not the fact that a meeting was held at the main gate guard house that might could have jeopardized the Company's relationship with the Coast Guard that motivated it to take the action it did with respect to Reynolds, but rather its actions were based on the fact Reynolds was the leader in the employees' efforts to seek assistance from the Union in dealing with the Company.

I find the Company failed to demonstrate it would have demoted and discharged Reynolds even in the absence of protected conduct on his and the other employees' part.

The Regional Director addressed the Union's (petitioner's) three numbered objections to conduct affecting the results

of the election in his Supplemental Decision, Direction and Order Consolidating Cases 11-RC-5740 and 11-CA-14209. In his decision, the Regional Director allowed the Union (Petitioner) to withdraw its Objections 1 and 2 and noted the Union (Petitioner) had not presented any evidence in support of its Objection 3. He accordingly dismissed that objection. The Regional Director did,

however, conclude that the unfair labor practice allegations set forth in the complaint herein, if proven, would constitute objectionable conduct sufficient to warrant setting the election aside. Accordingly, he ordered that the complaint allegations be considered as conduct not specifically alleged to have interfered with the election but that if proven would form a basis for setting the election aside. Having concluded that the unfair labor practice allegations of the complaint have been established, I find

the Company has interfered with the exercise of employee free choice in the election conducted on February 5, 1991. Accordingly, I recommend the election held on that date be set aside and a second election be directed.

Conclusions of Law

1. Pro/Tech Security Network is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, Plant Guard Workers of America (UPGWA) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company violated Section 8(a)(1) of the Act by coercively interrogating its employees concerning their union activities, sympathies, and desires.

4. The Company violated Section 8(a)(3) and (1) of the Act by demoting its employees Hassie Reynolds and Edwin Desiderio on December 16, and by thereafter discharging

Reynolds on December 31.

5. By the unfair labor practices found herein, the Company interfered with the freedom of choice of employees and it is recommended that the election in Case 11-RC-5740 be set aside and that a second election be directed.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Company has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company unlawfully demoted its employees Reynolds and Desiderio and thereafter unlawfully discharged Reynolds, I shall recommend Reynolds be

offered immediate and full reinstatement to his former position of employment, which he held prior to his demotion, or if his former position no longer exists to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed and that Reynolds and Desiderio both be made whole for any loss of earnings they may have suffered by reason of their demotion and discharge,

with interest. I note Desiderio was reinstated to his original position on or about February 21, 1991.

Backpay shall be computed in the manner prescribed in F.W. Woolworth Co., 90 NLRB 289 (1950), plus interest, as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987).[23] I also recommend the Company be

---

[23] Under New Horizons, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. Section 6621.

ordered to expunge from its files any reference to Reynolds' and Desiderio's demotion and Reynolds' discharge and notify them in writing this has been done and that evidence of these unlawful actions will not be used will not be used as a basis for any future personnel actions against them.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[24]

ORDER

The Company, Pro/Tech Security Network, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, demoting or

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

otherwise discriminating against employees because of their membership in or activities on behalf of the Union or because they engage in other protected concerted activities.

(b) Coercively interrogating employees as to their union activities, sympathies, and desires.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Hassie Reynolds immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set

forth in "The Remedy" section of this Decision and expunge any reference to his demotion or discharge from his work record.

(b) Make Edwin Desiderio whole for any loss of earnings and other benefits suffered as a result [*sic*] the discrimination against him in the manner set forth in "The Remedy" section of this Decision and expunge any reference to his demotion from his work record.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Elizabeth City, North Carolina facility copies of the

attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 11 in writing within 20 days from the date of this Order what steps the Company has taken to comply.

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[25] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER RECOMMENDED that the results of the election held on February 5, 1991, in Case 11-RC-5740 be set aside and that the representation matter be remanded to the Regional Director for Region 11 for the purpose of conducting a new election at such time as he deems the circumstances permit the free choice of a bargaining representative.

Dated, Washington, D.C. September 24, 1991

/S/
William N. Cates
Administrative Law Judge

"APPENDIX"

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

d-65

AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities

WE WILL NOT coercively interrogate our employees as to their union activities, sympathies and desires.

WE WILL NOT discharge or demote employees because of their activities on behalf of International Union, United Plant Guard Workers of America (UPGWA), or any

other labor organization.

We WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by section 7 of the Act.

WE WILL offer Hassie Reynolds immediate and full reinstatement to his former (Before demotion) job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privilege previously enjoyed, and WE Will make him whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest.

WE WILL make Edwin Desiderio whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest. WE HAVE already reinstated Edwin Desiderio to his former (before demotion) job.

WE WILL notify Hassie Reynolds and Edward Desiderio that we have

removed from our files any reference to their demotion or discharge and that such will not be used against them in any way.

PRO/TECH SECURITY NETWORK

(Employer)

DATED:_____

By:_____
(Representative)(TITLE)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, 251 North Main Street, Room 447, Winston-Salem, North Carolina 27101-3986. Telephone (919) 631-3212.

APPENDIX E

EXTRACTED TEXT OF CITED STATUTES

STATUTORY AND REGULATORY

PROVISIONS INVOLVED

Title 29 U.S.C. Section 151 states in pertinent part:

"The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages is such volume as

substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices

fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and

eliminate these obstructions when they have occurred by encouraging the practice and procedure of collection bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Title 29 U.S.C. Section 152 states in pertinent part:

"When used in this Act -

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature,

but requires the use of independent judgment."

Title 41 U.S.C. Section 405a states in pertinent part:

"The Administrator of the Office of Federal Procurement Policy is authorized and directed, pursuant to the authority conferred by Public Law 93-400 and subject to the procedures set forth in such Public Law, to promulgate a single, simplified, uniform Federal procurement regulation and to establish procedures for insuring compliance with such provisions by all Federal agencies...."

Title 48 Code of Federal Regulations Part 1.000 states in pertinent part as follows:

"This part sets forth basic policies and general information about the Federal Acquisition Regulation System including purpose, authority, applicability, issuance, arrangement, numbering, dissemination, implementation, supplementation, maintenance, administration, and deviation. Subparts 1.2,

1.3, and 1.4 prescribe administrative procedures for maintaining the FAR system."

Title 48 Code of Federal Regulations Part 49.402 and 49.402-6 state in pertinent part:

"49.402 Termination of fixed-price contracts for default.

* * *

49.402-6 Liquidation of liability.

The contract provides that the contractor and the surety are liable to the Government for resultant damages....If the retained and unpaid amounts are insufficient, the contracting officer shall take steps to recover the additional sum from the contractor and the surety."

Title 48 Code of Federal Regulations Part 52.249-8 states in pertinent part:

"Default (Fixed-Price Supply and Service)....

The Government may,...by written notice of default to the contractor, terminate this contract in whole of in part if the contractor fails to:...

(iii) Perform any of the other provisions of this contract...."

(2)

No. 93-589

FILED
DEC 31 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

PRO-TECH SECURITY NETWORK, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner's "watch commanders" are not "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act, and that petitioner violated Section 8(a) (3) and (1) of the Act by disciplining two of them because of their union activity.

2. Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a) (1) of the Act by interrogating its employees concerning their union activity.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a5) is unreported, but the judgment is noted at 993 F.2d 1538. The decision and order of the National Labor Relations Board (Pet. App. c1-c7) and the decision of the administrative law judge (Pet. App. d1-d68) are reported at 308 N.L.R.B. 655.

JURISDICTION

The decision of the court of appeals was entered on June 8, 1993. A petition for rehearing was denied on July 7, 1993. Pet. App. b1. The petition for a writ of certiorari was filed on September 15, 1993. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 16, 1990, petitioner, a sole proprietorship owned and managed by Isaiah Rhodes, began providing security services at the Coast Guard Base Support Center in Elizabeth City, North Carolina, pursuant to a contract with the United States Coast Guard (Coast Guard). Pet. App. d6-d7. Petitioner's personnel operate the checkpoint at the main gate to the facility and patrol various buildings and grounds. These services are provided daily in three eight-hour shifts, each of which is staffed by a "watch commander" and two patrol persons. *Id.* at d7-d8.

During October and November 1990, petitioner's employees discussed among themselves the possibility of being represented by a union. As a result of these discussions, employee Hassie Reynolds, a watch commander, contacted the United Plant Guard Workers of America (the Union). Reynolds agreed to arrange for the employees to meet with representatives of the Union so that the Union could determine whether it enjoyed sufficient support to file a representation petition with the National Labor Relations Board (Board). Pet. App. d8-d10.

That meeting took place on November 24 in the guardhouse at the main gate of the Coast Guard facility. Pet. App. d10. Nine of petitioner's fourteen employees attended, including Reynolds, who was on duty as watch commander during the meeting, and Edwin Desiderio, an off-duty watch commander. *Id.* at d12, d13. As Desiderio described it, "[T]he whole Union meeting was * * * so we could see what we could do to get our uniform pay and holiday pay * * *. [E]verybody was dissatisfied with what was

going on up there." During the discussion, Desiderio, referring to Rhodes, commented "let's screw the bastard." *Id.* at d13-d14.

Rhodes quickly learned about the union meeting through telephone calls from some of the employees who had attended it. Pet. App. d14. When Reynolds reported for work on November 28, Howard Simons, petitioner's "site supervisor" at the Coast Guard facility, advised him to be "careful of what you say, Mr. Rhodes knows all about your meeting, who was there, [and] what took place." *Id.* at d15. Simons also informed Reynolds that Rhodes had told him, "[L]et them go ahead and have their fucking Union, [I (Rhodes)] could bargain with it." *Id.* at d15-d16.

On December 10, the Union filed a representation petition with the Board. Pet. App. d16. Two days later, on December 12, Rhodes sent Simons a letter announcing the demotion of Reynolds and Desiderio from the rank of watch commander to patrolman. In that letter, Rhodes explained that he was demoting Reynolds "[s]o that he can perform his duties for the union." *Id.* at d18. Rhodes gave no reason for demoting Desiderio. The Union challenged the demotions on December 24 by filing an unfair labor practice charge with the Board. *Id.* at d1-d2. On December 31, Simons placed Reynolds on indefinite suspension for "failure to perform supervisory duties" during the union meeting, *id.* at d22, and he issued Desiderio a written warning which gave, as justification for Desiderio's demotion, his use of "abusive language" in referring to Rhodes as a "bastard" during the union meeting. *Id.* at d22-d23.

In late December, Rhodes personally distributed a "survey" to the employees concerning the November 24 union meeting, which he asked them to read and

sign. Pet. App. d23, d25. Rhodes prepared and distributed the survey in order to verify how many employees had "signed up with the union." *Id.* at d33.[1]

On February 5, 1991, the Board conducted a secret-ballot election. The election resulted in a seven-to-

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[1] The survey read as follows (Pet. App. d23-d25):

> TO: PRO-TECH SECURITY NETWORK
> ATTN: I.R. RHODES/GEN MGR
>
> In regards to the meeting held on November 24, 1990, between the hours of 1:30 p.m.-3:10 p.m.
>
> *PLEASE NOTE THAT THE CARD THAT YOU SIGNED WAS TO JOIN A UNION!!!*
>
> I was not misinformed about the Union, when I signed the card to [the] best of my knowledge.
>
> Yes —— No ——
>
> I was misinformed when I signed the card and did not at that time intend to join the Union.
>
> Yes —— No ——
>
> I understood that by signing the card that it was just to listen to a representative from the Union.
>
> Yes —— No ——
>
> I would rather not comment.
>
> Yes —— No ——
>
> I did not sign the card.
>
> Yes —— No ——
>
> Signed: ————————
>
> Dated: ————————

Rhodes claimed that he distributed the survey because he understood the Union's representation petition to state that 13 employees had already joined the Union, and he believed it "almost impossible" for that number actually to have done so. Pet. App. d25. The representation petition stated, however, that 13 employees were in the proposed bargaining unit, not that 13 had joined the Union. *Id.* at d17 n.12.

seven tie, with no challenged or void ballots. Pet. App. d28. On February 20, Rhodes telephoned Desiderio to ask him whether he wanted to return to his position as a watch commander. When Desiderio asked Rhodes why he was making him the offer, Rhodes replied, "Because I think you're capable of doing the job." *Id.* at d29. Desiderio resumed work as a watch commander the following day, but did not receive lost wages for the period of his demotion. *Id.* at d29, d30 n.16. Reynolds was never called to work from his indefinite suspension.

2. On February 7, 1991, the Board's General Counsel issued a complaint against petitioner based on the Union's unfair labor practice charge. The complaint alleged that petitioner's discipline of Reynolds and Desiderio violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act), 29 U.S.C 158(a)(3) and (1), and that the distribution of the survey independently violated Section 8(a)(1). Pet. App. d2-d3.

After a hearing, an administrative law judge (ALJ) concluded that employees, including Reynolds and Desiderio, who attended the November 24, 1990 meeting with the Union's representatives were engaged in activity protected by the Act. Pet. App. d43-d47. Then, applying the Board's test in *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), the ALJ concluded that petitioner's discharge of Reynolds and demotion of Desiderio violated Section 8(a)(3) and (1) of the Act. The ALJ found that petitioner took those adverse actions against Reynolds and Desiderio because of their participation in the union meeting, and, moreover, that petitioner failed to demonstrate that it would have done so had

they not engaged in protected activity. Pet. App. d42-d43, d47-d56.

In reaching that conclusion, the ALJ rejected petitioner's contention that Reynolds and Desiderio, as watch commanders, were "supervisors" within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11), and thus not covered by the protections of the Act.[2] Pet. App. d42. The ALJ found that petitioner's watch commanders do not possess or exercise any authority respecting the hiring, transferring, suspending, laying off, recalling, promoting, discharging, rewarding, or adjusting grievances of patrol persons. *Id.* at d40. Moreover, the ALJ observed, a watch commander's duties do not require the exercise of independent judgment: to the limited extent that a watch commander's tasks are not routine or repetitious, he or she contacts Coast Guard officials for relevant instructions. *Id.* at d39. The ALJ also noted that watch commanders do not assign work to patrol persons, cannot grant patrol persons time off or permission to leave work early, and do not direct the work of patrol persons, since each patrol person has a written description of his or her duties and carries them out

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[2] Section 2(3) of the Act, 29 U.S.C. 152(3), excludes from the definition of "employee," and thus from the unfair labor practice provisions of Section 8, "any individual employed as a supervisor." Section 2(11) defines "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

without guidance or input from the watch commander. *Ibid.*

Applying the Board's test in *Rossmore House*, 269 N.L.R.B. 1176 (1984), enforced *sub nom. Hotel Employees Local 11* v. *NLRB*, 760 F.2d 1006 (9th Cir. 1985), the ALJ also concluded that the survey distributed to the employees by Rhodes constituted unlawful interrogation under Section 8(a)(1) because, in the totality of the circumstances, it reasonably tended to restrain or interfere with the employees' exercise of rights protected by the Act. Pet. App. d30-d34.

The Board affirmed the ALJ's decision and adopted his remedial order which, *inter alia*, required petitioner to reinstate Reynolds as a watch commander and to make both Reynolds and Desiderio whole for lost pay and other benefits. Pet. App. c1-c7, d62-d63.[3]

3. The court of appeals enforced the Board's order in an unpublished per curiam opinion. Pet. App. a1-a5. The court affirmed, as supported by substantial evidence, the Board's findings that petitioner's demotion of Desiderio, discharge of Reynolds, and distribution of the survey violated Section 8(a)(3) and (1) of the Act. *Id.* at a5.

---

[3] The Board, in agreement with the ALJ, also concluded that a new election was warranted because of petitioner's unfair labor practices. Pet. App. c4-c7, d56-d58. That aspect of the Board's order was not before the court of appeals, see *Firestone Synthetic Fibers Co.* v. *NLRB*, 374 F.2d 211, 213 n.3 (4th Cir. 1967), and no issue respecting it is raised here.

ARGUMENT

1. Petitioner contends (Pet. 16-20) that the Board's finding that its watch commanders are not supervisors within the meaning of Section 2(11) of the Act conflicts with its contract with the Coast Guard, which requires petitioner to classify the watch commanders as "supervisory," and that the Coast Guard's determination is binding as a matter of law on the Board.

That claim is not properly presented in this Court. Petitioner raised that contention for the first time in a petition for rehearing in the court of appeals. Before the ALJ, the Board, and the court of appeals, petitioner had previously urged that, in all of the circumstances, including the terms of the Coast Guard contract, its watch commanders were not supervisors under Section 2(11) of the Act. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Since petitioner has shown no such circumstances here, it is jurisdictionally barred from raising its contention before this Court. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).

In any event, petitioner's contention is without merit. Nothing in the Board's decision precludes petitioner from treating its watch commanders as "supervisors" for purposes of the Coast Guard contract. But not every individual who exercises some supervisory authority over subordinates is a supervisor under Section 2(11) of the Act.[4] Whether an

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[4] For example, Section 2(11) preserves a distinction "between straw bosses, leadmen, set-up men, and other minor

individual is a Section 2(11) supervisor is determined not by his or her job title or job classification, but by whether the individual is vested by the employer with the duties and authority specified in Section 2(11). Pet. App. d37; *NLRB* v. *Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied, 359 U.S. 911 (1959); *Food Store Employees Local 347* v. *NLRB*, 422 F.2d 685, 689-690 (D.C. Cir. 1969); *Omnix Int'l Corp.*, 286 N.L.R.B. 425, 426 (1987); *Open Taxi Lot Operation-San Francisco Int'l Airport*, 240 N.L.R.B. 808, 809 (1979). That determination is exclusively for the Board to make, subject to deferential judicial review. See *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 179 n.6 (1962). The ALJ examined the job duties of petitioner's watch commanders and concluded that they are not vested with any of the indicia of supervisory authority specified by Section 2(11). That fact-bound determination does not warrant this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Contrary to petitioner's submission, the Board's decision in this case ignores neither petitioner's legitimate interests, nor those of the Coast Guard. A finding that the watch commanders are "employers," rather than "supervisors," under the Act does not preclude petitioner from disciplining or discharging them for failing to perform their assigned job duties

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supervisory employees * * * and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947); see *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974).

in a manner consistent with the requirements of the Coast Guard contract. See Section 10(c), 29 U.S.C. 160(c) ("[n]o order of the Board shall require the reinstatement of any individual as an employee * * * if such individual was suspended or discharged for cause"). The Board found, however, that petitioner discharged Reynolds and demoted Desiderio, not for any such legitimate reason, but rather in retaliation for their having participated in protected activity. Pet. App. c2-c3 n.2, d52, d55, d56. That finding raises only another evidentiary issue that does not warrant this Court's review.

2. Petitioner also contends (Pet. 22-24) that the Board's finding that the survey distributed by Rhodes to the employees was unlawful interrogation under Section 8(a)(1) of the Act is not supported by substantial evidence. That contention is without merit. Under the Board's test, in *Rossmore House*, *supra*, an employer's interrogation of employees respecting their union activities violates Section 8(a)(1) if, "under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." 269 N.L.R.B. at 1177. Among the factors relevant to that determination are whether the interrogation takes place against a background of employer hostility or discrimination toward protected activity; the nature of the information sought; the identity of the questioner; and the place and method of interrogation. *Id.* at 1178 n.20, citing *Bourne* v. *NLRB*, 332 F.2d 47 (2d Cir. 1964). The ALJ evaluated petitioner's survey under *Rossmore House*. He found that the questioner, Rhodes, was petitioner's highest ranking official, that the survey specifically asked whether the responding em-

ployee had signed a union card, and that the survey implied that Rhodes knew or learned about union meetings as they occurred. Pet. App. d32-d33. The ALJ further noted that Rhodes did not provide recipients of the survey assurances against reprisal, and that he wanted employees to return completed surveys signed. *Id.* at d33. In light of those circumstances, the ALJ reasonably concluded that the survey had a reasonable tendency to interfere with the employees' exercise of their right to organize a union. *Id.* at d34.

Petitioner asserts (Pet. 22-23) that the survey cannot be deemed an unfair labor practice unless Rhodes was motivated by an "improper subjective intent," and that Rhodes' explanation of why he decided to distribute the survey shows that his motive was a legitimate one. This contention is incorrect for two reasons. First, under the Board's *Rossmore House* test (which petitioner does not challenge), the inquiry into whether interrogation violates Section 8(a)(1) is an objective one that requires analysis of all of the circumstances in which the questioning of employees occurs. The relevant issue is whether the interrogation reasonably tends to restrain, coerce, or interfere with employees' exercise of rights guaranteed by the Act, not whether the questioner was actually motivated by a desire to do so. *Rossmore House*, 269 N.L.R.B. at 1177; *W.A. Sheaffer Pen Co.* v. *NLRB*, 486 F.2d 180, 181-182 (8th Cir. 1973).

Second, where, as here, the union has filed a representation petition with the Board, a poll of employees respecting their union allegiances serves no legitimate employer interest, since the Board election itself will establish the union's numerical strength in

the bargaining unit. *Struksnes Construction Co.*, 165 N.L.R.B. 1062, 1063 (1967); *NLRB* v. *Harry F. Berggren & Sons*, 406 F.2d 239, 243 n.5 (8th Cir. 1969). Thus, as the ALJ observed (Pet. App. d33), even accepting Rhodes' proffered reason for distributing the survey—his desire to verify whether, as he understood the Union's representation petition to state, 13 employees had "signed up with the union"—that explanation does not constitute a lawful basis for his action.[5]

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[5] Petitioner errs in relying (Pet. 23) on *NLRB* v. *Brown*, 380 U.S. 278 (1965). *Brown* involved a categorically different variety of employer conduct from that presented in this case: there, a multi-employer bargaining group locked out its employees and continued operations with temporary replacement workers in response to a whipsaw strike against one of its members. *Id.* at 279-280. The Court explained that, in those circumstances, "the resulting harm to employee rights is * * * comparatively slight, and a substantial and legitimate business end is served" by the employers' actions. *Id.* at 289. On those particular facts, the Court held that "the finding of an unfair labor practice under [Section] 8(a)(3) requires a showing of improper subjective intent" on the part of the employers, and that, "in the absence of evidentiary findings of hostile motive," their conduct could not be deemed to violate Section 8(a)(1). *Id.* at 286, 289. The Court confirmed in *Brown*, however, that where, as here, "the employer conduct is demonstrably destructive of employee rights and is not justified by the service of significant or important business ends," then "the Board need not inquire into employer motivation to support a finding of an unfair labor practice." *Id.* at 282.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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